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No. 78-413

In the Supreme Court of the United States

OCTOBER TERM, 1978

OTIS R. BOWEN, AS GOVERNOR OF INDIANA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, various Indiana State officials and the Indiana State Board of Education, seek review before judgment in the court of appeals of a district court order to implement an interdistrict school desegregation remedy. They also seek review of an order of the court of appeals remanding the case to the district court to permit that court to consider a request for modification of its remedial order. Neither order raises any issue worthy of review at this time.

1. On January 25, 1977, this Court vacated an order of the court of appeals, which had affirmed an injunction providing for interdistrict school desegregation of the metropolitan Indianapolis public schools. 429 U.S. 1068. This Court remanded the case for further consideration in

light of *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). On February 14, 1978, the court of appeals in turn remanded the case to the district court, with directions to reconsider the issue of segregative intent and, if necessary, to reconsider what relief would be appropriate in light of this Court's intervening decision in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977).[1]

On June 2, 1978, the district court entered an order refusing to permit the Indianapolis public school system (IPS) to adopt an intradistrict remedy. Notices of appeal were filed from that order. Subsequently, on July 11, 1978, the district court entered a further order, holding that segregation in the metropolitan Indianapolis public schools was at least in part the result of intentionally discriminatory acts by state officials. The court then ordered that black students be transferred from the Indianapolis system into suburban districts for the 1978-1979 school year, and it required IPS to submit plans for the final desegregation of the Indianapolis system. Again, notices of appeal were filed immediately by several parties.

On July 25, 1978, the court of appeals held oral argument on several questions arising from the two sets of appeals. In light of representations made at oral argument, the court of appeals on July 28, 1978, entered an order (Pet. App. A-36) stating that if IPS should request modification of the district court's July 11 order, the court of appeals would entertain a motion for leave to

[1]Petitioners filed a petition for a writ of certiorari (No. 77-1614) from the order of the court of appeals remanding the case for further proceedings in the district court. That petition was denied on October 2, 1978.

permit the district court to consider that request (Pet. App. A-34). IPS made such a motion on August 1, 1978 (Pet. App. A-37), and on August 11, 1978, the court of appeals granted the motion (Pet. App. A-46), remanding the case for the limited purpose of "hearing and deciding upon modification of the July 11th judgment" (*id.* at A-47). The district court, also acting on August 11, 1978, stayed implementation of interdistrict transfers until the second semester of the 1978-1979 school year. On August 15, 1978, IPS submitted plans for two-way both one-way and interdistrict transfers together with a motion for a hearing on the plans (Pet. App. A-38). The district court granted the motion and scheduled the hearing for November 6, 1978.

2. The petition first seeks review of the district court's July 11 order finding purposeful discriminatory state action and directing the submission of a plan for an interdistrict remedy. Review of the July 11 order would be inappropriate at this time, however, for two reasons: first, the order has not yet been reviewed on the merits by the court of appeals; and second, the district court has stayed the effectiveness of the order and has under consideration the IPS request to modify it.

A request for certiorari before judgment in the court of appeals is granted only in cases of "imperative public importance" where there is an obvious need for prompt resolution. Sup. Ct. R. 20. See also *United States* v. *Nixon*, 418 U.S. 683 (1974); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 285 (1936). The issues presented by this case—the presence of segregative intent and the propriety of interdistrict school desegregation relief—are not of first impression, but have been specifically addressed in the past by this Court. *E.g.*, *Washington* v. *Davis, supra; Milliken* v. *Bradley*, 418 U.S. 717 (1974). Accordingly, this case presents only the question of the application of settled legal principles to a particular set of facts.

Petitioners further suggest that consideration of interdistrict relief has improperly delayed intradistrict desegregation of the IPS (Pet. 12, 17) and that the court of appeals and district court were therefore obligated to dismiss any attempt to seek interdistrict relief. However, the court of appeals has ordered the high school portion of the IPS's intradistrict plan implemented for this school year (Pet. App. A-35). While the remainder of the IPS intradistrict plan has been held in abeyance pending district court action on interdistrict relief, the court of appeals, on August 17, 1978, advised the parties that they could, by motion, seek to proceed with the remaining portions of the intradistrict appeal. Accordingly, contrary to petitioners' suggestion, the court has not halted consideration of intradistrict relief.

3. Petitioners also request that this Court review the August 11, 1978, order of the court of appeals, arguing that the August 11 order is in conflict with this Court's January 25, 1977, remand order. But the August 11 order did not deal at all with the issue of segregative intent, the subject of this Court's remand; it dealt instead with the issue of the propriety of interdistrict relief, leaving the issue of segregative intent for later resolution. Rather than causing further delays, the appellate court's limited remand may well expedite final resolution of this case. The limited remand will enable the district court to complete its consideration of all the interdistrict proposals presented by the parties, and it will permit the preparation of a complete record on the issue of the interdistrict effect of segregatory state actions. Any appeal that follows will therefore present the issue of interdistrict relief with the benefit of a full record. This procedure may well eliminate an additional round of appeals that might have proved necessary if the court of appeals had proceeded immediately to consider the July 11 order on its merits and

concluded that the district court had erroneously failed to consider alternative methods of interdistrict desegregation.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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